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10074—33——1

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 363

THE ARROW-HART & HEGEMAN ELECTRIC COMPANY, petitioner

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1043–1051) is reported in 65 F. (2d) 336. A *per curiam* opinion (R. 1039–1042) with respect to petitioner's motion to amplify the record and to respondent's motion to strike certain portions of the petition is reported in 63 F. (2d) 108.

JURISDICTION

The judgment sought to be reviewed was entered June 6, 1933. (R. 1052.) The petition for certiorari was filed August 19, 1933. Petitioner invokes the jurisdiction of this Court under Section 11 of the Clayton Act (38 Stat. 730, 735) and under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the acquisition by a holding company of all of the voting stocks of two manufacturing corporations, where 59% of the products of one of those corporations were sold in active and direct competition with all of the products of the other, and where the combined annual sales of the two corporations constituted about 24% of the total sales of the entire industry, may properly be found by the Federal Trade Commission to constitute a violation of Section 7 of the Clayton Act.

(2) Whether the jurisdiction of the Federal Trade Commission to require a restoration of the competition previously existing between two corporations whose stocks were illegally acquired by a holding company, may be defeated after the filing of a complaint by the Commission under Section 7 of the Clayton Act, by a merger of the competing corporations, accomplished with the aid of the unlawfully acquired stocks.

STATUTE INVOLVED

Sections 7 and 11 of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, 731–733, 734–735) are set forth in part in the Appendix, *infra*, pp. 19–22.

STATEMENT

On March 3, 1928, the Federal Trade Commission issued a complaint (R. 3–9) against Arrow-Hart & Hegeman, Incorporated (hereinafter referred to as the respondent) charging that it had violated and was violating Section 7 of the Act of October 15, 1914, known as the Clayton Act. The complaint alleged that the respondent was a Connecticut corporation, organized on October 4, 1927, for the purpose of acquiring the share capitals of The Hart & Hegeman Manufacturing Company and The Arrow Electric Company, Connecticut corporations, and that, on October 10, 1927, it had acquired all of the shares of common stock of said corporations. (R. 3.) It alleged further that The Hart & Hegeman Manufacturing Company owned and operated a plant, located at Hartford, Connecticut, which manufactured electrical wiring devices of various kinds. Its total sales for the year 1926 were $4,089,621, of which $3,505,988 were made in interstate commerce in competition with The Arrow Electric Company and other corporations similarly engaged. (R. 4.) The complaint alleged further that The Arrow Electric Company owned and operated a plant at Hartford, where

it also manufactured electrical wiring devices. (R. 5.) Its total sales for 1926 were $4,125,181, of which $3,869,715 were made in interstate commerce in competition with The Hart & Hegeman Manufacturing Company and others. (R. 5.) The complaint charged finally that the effect of the acquisition by the respondent of the common stocks of these two manufacturing concerns might be and was substantially to lessen competition in electric wiring devices between The Hart & Hegeman Manufacturing Company and The Arrow Electric Company and to restrain commerce in electrical wiring devices in the sections or communities in which such corporations were severally engaged, and tended to create a monopoly in electrical wiring devices of various types and classes. (R. 6–7.) Notice was given that a hearing would be held on May 3, 1928, with respect to the charges set forth in the complaint. (R. 7–9.) The time allowed respondent to answer the complaint was extended from time to time, the answer being filed on September 7, 1928. (R. 12–17.)

On November 10, 1928, Edward R. Grier, the president of respondent (and also vice-president of the Arrow Electric Company), addressed a letter to its stockholders stating that dissolution of the holding company and a distribution of its assets had been recommended by counsel to meet the recent criticism of the Federal Trade Commission, and stating further that the directors had voted to rec-

commend such dissolution. (Exh. A, R. 61.) He stated that the entire assets of the corporation were the shares of common stock of the two manufacturing companies, and that it was expected that distribution of these shares would be made in kind, so that each stockholder would receive shares of the common stock of either one or both of the manufacturing companies. (R. 61.) There was enclosed with the letter a notice of a special meeting of stockholders to be held December 10, 1928 (R. 60) and a proxy authorizing the dissolution and distribution of assets. (R. 61.) He stated that he believed that upon distribution of the company's assets the directors of the two manufacturing companies would propose to their respective stockholders an agreement of consolidation of the two companies. (R. 62.)

On December 1, 1928, a supplemental letter was addressed to the respondent's stockholders indicating fully the various steps which would be taken to consummate a plan of reorganization. (Exh. B, R. 63–66.) The steps proposed were as follows: (1) The respondent, Arrow-Hart & Hegeman, Incorporated, would transfer the shares of common stock of The Arrow Electric Company which it held to a new Arrow company in exchange for all of the capital stock of the latter, such new shares to be issued either to respondent or directly to its stockholders in proportion to their present holdings of respondent's stock; (2) a similar transfer of the

shares of The Hart & Hegeman Manufacturing Company held by respondent would be made to a new Hart & Hegeman company in exchange for all of the latter's capital stock (these two transactions to be authorized at a special meeting of stockholders to be held December 6, 1928, a notice of which was enclosed); (3) when the exchange of shares in conformity with the plan of reorganization, "made necessary to meet the criticism of the Federal Trade Commission", was consummated, respondent would be dissolved at the meeting already scheduled for Decemer 10, 1928; and (4), immediately thereafter the four corporations then in existence, viz, the two manufacturing companies and the new Arrow and Hart & Hegeman companies, would be merged or consolidated. (R. 63–64.) These separate steps, the president's letter stated, were a part of one plan of reorganization, which, in the opinion of counsel, was desirable to meet the criticism of the Federal Trade Commission and to bring the reorganization within the provisions of the Revenue Act of 1928, so as to involve no tax to any stockholder. (R. 65.) It was essential, the letter stated, to have the cooperation of the stockholders in effecting these steps, and proxies were enclosed authorizing the holders to vote in favor of the plan, to receive the stockholders' shares in the new companies, and to surrender such shares for shares of stock of the merged or consolidated corporation. (R. 65.)

At the special meeting of stockholders of respondent, held December 6, 1928, the reorganization plan was adopted (Exh. C, R. 68–75); respondent then transferred its Arrow and Hart & Hegeman stocks, respectively, to the new corporations, known as The Arrow Manufacturing Company and The H & H Electric Company (R. 77); and, on December 10, 1928, a preliminary certificate of dissolution of respondent was authorized to be filed. (R. 79.) (The final certificate was filed April 11, 1929. (R. 81.)) Thereafter, on December 31, 1928, an agreement of consolidation or merger (Exh. I, R. 200–212) between The Arrow Electric Company, The Hart & Hegeman Manufacturing Company, The Arrow Manufacturing Company and The H & H Electric Company was ratified by the stockholders of each. (R. 92–96, 109–113, 152–157, 194–199.) The petitioner, The Arrow-Hart & Hegeman Electric Company, was formed as a result of this merger. (R. 200.)

On June 29, 1929, the Federal Trade Commission filed its supplemental complaint making the petitioner a joint respondent in the proceeding, relating anew the allegations set forth in its original complaint, and setting forth the steps resulting in the formation of the petitioner. (R. 24–41.) The supplemental complaint charged that the stocks of the competing manufacturing companies which were unlawfully acquired were used to effect the merger and to vest the capital stocks and physical

properties of the manufacturing concerns in the petitioner (R. 33); that the transfer by respondent of the capital stocks of the manufacturing companies to the new Arrow and H & H companies was not preceded by the restoration of the independent and competitive status of the two manufacturing companies, but was accomplished by virtue of authorization given by respondent's stockholders, who were not acting independently as stockholders of either company but in effect as stockholders of both (R. 34–35); and that such divestment by the holding company of the stocks, by transfer to the two new companies, did not constitute a compliance with Section 7 of the Clayton Act. (R. 36–37.) It alleged finally that the steps in the reorganization were taken and consummated at the instance of and through the leadership of the respondent holding company (R. 37), and charged that the intent and purpose of the respondent, its officers and stockholders was to oust the Commission of jurisdiction in violation of Section 7 of the Clayton Act. (R. 38.) A supplemental answer was filed October 14, 1929, and a hearing held before an examiner of the Commission, beginning on May 25, 1931.

On July 6, 1932, the Commission issued its findings of fact and order. (R. 230–260, 261–263.) The Commission found that:

The Hart & Hegeman Manufacturing Company, of Hartford, Connecticut, organized in 1891, had been engaged in the manufacture and sale of electrical wiring devices, including particularly electric snap switches and wall plates. In 1914, it began selling as exclusive agent the line of electrical devices consisting of sockets, receptacles, and attachment plugs manufactured by the H. T. Paiste Company, of Philadelphia, all of whose outstanding stock it subsequently acquired. (R. 232.) At the time of the acquisition of its common stock by the respondent, it was engaged in the sale and distribution throughout the United States of a full line of electrical wiring devices to electrical jobbers and other customers. (R. 233.) The Arrow Electric Company, also of Hartford, manufactured a general line of electrical wiring devices, including sockets, receptacles, attachment plugs, switches, etc. (R. 235.) It also sold its products throughout the country. (R. 235.) The two companies were in direct and substantial competition in the manufacture, sale, and distribution in interstate commerce of a full line of electrical wiring devices, usually described in the trade as "shelf goods", or wiring devices ordinarily stocked and distributed by electric supply distributors or jobbers. (R. 236.) Both companies maintained branches, sales offices, or commission men in Boston, New York City, Baltimore, Chicago, and San Francisco. (R. 237.)

Their respective sales through such branches for 1926, were as follows (R. 238):

Cities	Arrow Electric Co.	Hart & Hegeman Mfg. Co.
Boston	$483,933	$315,914
New York	1,107,680	1,010,373
Baltimore	240,517	144,163
Chicago	1,524,220	1,368,941
San Francisco	462,989	169,254

The approximate domestic sales for The Arrow Electric Company in 1926 were $3,825,000, and for The Hart & Hegeman Manufacturing Company, $3,145,000. (R. 238.) Their sales for the years 1927 and 1928 were (R. 255–256): Arrow, $3,849,000, $3,537,000; Hart & Hegeman, $4,537,000, $4,478,000. At the time their respective common stocks were aequired by the respondent, at least 59% of the volume of Hart & Hegeman sales, consisting of "shelf goods", was sold in direct and active competition with the entire output of The Arrow Electric Company. (R. 238.) Approximately 25% to 30% of the customers of each company were joint customers. (R. 239.) The total volume of sales of both companies in 1927 was in excess of 25% of the total volume of sales of all manufacturers of electrical wiring devices in that year. (R. 256.) The Commission found that the petitioner was the largest producer of electrical wiring devices in the United States. (R. 256.)

The Commission also found that, on October 10, 1927, the holding company acquired the 20,000

shares of Hart & Hegeman common stock by exchanging therefor 80,000 shares of its capital stock (R. 234), and that it acquired the 30,000 shares of Arrow common stock in exchange for 120,000 of its shares. (R. 236.)[1] The common stocks of the two companies had exclusive voting rights, except in case of default. (R. 234, 235.) The Commission found that shortly after the formation of the holding company, The Arrow Electric Company purchased from Hart & Hegeman the machinery, equipment, and inventory of the subsidiary, H. K. Paiste Company, and took over the business of manufacturing porcelain parts for The Hart & Hegeman Company. (R. 252, 348.) The two operating companies also manufactured certain other articles for each other. (R. 252.) The plant of the

[1] The common stock of The Arrow Electric Company, as well as that of The Hart & Hegeman Manufacturing Company, was closely held. Exhibit 10 has appended a list of the common stockholders of both companies as of August 6, 1927. Of the 30,000 shares of Arrow common stock, Edward R. Grier, vice president, held 5,044 shares; Edward Bosworth Grier, assistant secretary, 5,044 shares; Charles G. Perkins, president, 6,304 shares; and Benjamin C. Perkins, a director, 6,304 shares. Stock control of The Hart & Hegeman Company was in the hands of the Morris family. (R. 271.) All of the above-named individuals and Samuel P. Williams, president of Hart & Hegeman, were parties to and instrumental in causing each of the various corporate steps, hereinabove described, to be taken. They also held the controlling stock interest in the respondent holding company, organized in October 1927 (Exh. 38.), which is also substantially the case with respect to the petitioner, created as a result of the merger.

Electrical Porcelain Manufacturing Company, another Hart & Hegeman subsidiary, was also closed and its machinery and equipment transferred to a subsidiary of The Arrow Company. (R. 252.)

The Commission found further that the respondent had caused the formation of the new Arrow Manufacturing Company and The H & H Electric Company, to which its assets (the capital stocks) were transferred. (R. 242.) It found also that, on December 31, 1928, the holders of the common stock of the petitioner, the merged corporation, were identical with the stockholders of the holding company, on November 30, 1928; and that the directors of the petitioner, on January 1, 1929, were the same persons who were directors of the respondent before the merger. (R. 250.) Messrs. Grier and Williams, the president and vice president of the respondent, occupied the same positions in the merged corporation. (R. 250.)

The Commission concluded that the divestment by the respondent of the common stock of the two manufacturing companies was not a compliance with the Clayton Act; that the steps in the reorganization plan were not taken to restore the competition which previously existed between the two manufacturing companies, but constituted an artifice and subterfuge designed to evade Sections 7 and 11 of the Clayton Act, and to perpetuate the elimination of competition which had existed between the two manufacturing companies prior to October 10, 1927. Whereupon, it issued its order

requiring the petitioner to divest itself of the stock and assets of one or the other of the two formerly competing companies. (R. 261–263)

Petitioner sought in the court below to have the Commission's order set aside and, from a decree sustaining the order, seeks this review.

ARGUMENT

I

It is submitted that certain findings of fact of the Federal Trade Commission which are not controverted, clearly support its conclusion that the acquisition of the voting stocks of the two competing manufacturing corporations constituted a violation of Section 7 of the Clayton Act. It found that in the years 1927 and 1928, the period of the holding company, the total sales of The Arrow Electric Company were $3,849,000 and $3,537,000, and for The Hart & Hegeman Company, $4,537,000 and $4,478,000. (R. 255, 256.) In 1927, their combined sales constituted approximately 25% of the total volume of sales of electrical wiring devices of all descriptions by all manufacturers. (R. 256.) At the time when their stocks were acquired, 59% of the volume of Hart & Hegeman sales was sold in direct and active competition with the entire output of The Arrow Company. (R. 238.) Such products were of similar quality and price and sold to the same class of trade. (R. 238.) Sales divisions were maintained in the same cities and from 25%

to 30% of their customers were common to both. (R. 237, 239.) These facts show not only that there was substantial competition between the two corporations, but also that each of the corporations controlled a substantial portion of the total business. The Commission found the petitioner to be the largest producer of electrical wiring devices in the United States. (R. 256.)

Petitioner's contention that the acquisition of stock did not violate Section 7 of the Act is not supported, as it asserts, by the decision of this Court in *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291. In that case, the two companies involved were found to be in competition in respect of not more than 5% of their respective sales. Moreover, the company whose stock was acquired was faced with financial ruin, so that it was doubtful whether the effect of the acquisition would be to eliminate competition in the future. It was upon the basis of these facts that the Court held Section 7 to be inapplicable. Petitioner refers to the statement of the Court that the Act applies only to such acquisitions as probably will result in the lessening of competition to a substantial degree, that is, to such a degree as will injuriously affect the public (p. 299), and relies upon the absence of proof of direct injury to the public resulting from this acquisition. We submit that there is nothing in the *Shoe case* which lends support to the view that proof of injury to the public in the form of

increased prices, or monopoly, is prerequisite to the application of the Act. The Court, in the statement relied on, pointed out that obviously there could be no injury to the public in "the lessening of competition, which, to begin with, is itself without real substance." (P. 298.) Where, as here, the competition is of real substance, there would seem to be no question as to the existence of public interest.

Petitioner contends apparently that competition was not lessened by the acquisition of stock, because, it is asserted (Br., p. 20), the holding company did not exercise control over the sales policies of the manufacturing companies. While this is not conceded (*supra*, pp. 11–12), it is hardly necessary to point out that, in any case, the power to exercise control existed, and undoubtedly would have been exercised, as occasion required, had the holding company continued. And such rivalry as there may have been between salesmen engaged in a common cause and subject to the same control cannot, in any sense of the word, be regarded as competition. (See *Sinclair Refining Co.* v. *Federal Trade Commission*, 276 Fed. 686, 688 (C.C.A. 7th).)

We think it clear, moreover, that there is no conflict between the decision below and that in *Temple Anthracite Coal Company* v. *Federal Trade Commission*, 51 F. (2d) 656 (C.C.A. 3d), for there the combined production of the two companies involved was found to be inconsequential.

II

Petitioner contends that even if the stock acquisition was illegal, the jurisdiction of the Commission was defeated by the steps taken subsequent to the filing of the complaint. (*Supra*, pp. 4–7.) This contention is equivalent to the assertion that stocks illegally acquired may be used to perpetuate the forbidden lessening of competition, thus rendering Section 7 of the Clayton Act adentate. We submit that Congress has evidenced a contrary intention, as this Court indicated in *Federal Trade Commission* v. *Western Meat Company*, 272 U.S. 554.

In that case, the Commission's order required the respondent so to divest itself of the stock of a competing packing company as to include in such divestment the plant and physical properties of the company. The Court sustained the order, stating that the divestment of stock should be actual and complete, and could not be effected by using the control resulting from the ownership of the stock to secure title to the assets of the company whose stock was acquired. (P. 560.) In the present case, the illegally acquired stocks were employed to effectuate the merger. (*Supra*, p. 7.)

The other two cases considered with the *Western Meat* case (*Thatcher Manufacturing Company* v. *Federal Trade Commission; Swift & Company* v. *Federal Trade Commission;* 272 U.S. 554, 560, 561) do not support petitioner's view that the Commis-

sion was ousted of jurisdiction after the filing of the original complaint, but, rather, the contrary view. In the *Thatcher case,* the petitioner acquired the stocks of three competing corporations, and caused a transfer to it of their assets, the corporations being dissolved. The Commission then filed its complaint under Section 7. The Court held the subsequently entered order of the Commission, which required divestiture of the assets, to be beyond the Commission's authority, on the ground that the assets were obtained prior to any action by the Commission. The Court said (p. 561):

> The Act has no application to ownership of a competitor's property and business *obtained prior to any action by the Commission,* even though this was brought about through stock unlawfully held. (Italics ours.)

In the *Swift case,* likewise, a similar order of the Commission was set aside on the ground that the assets had been acquired prior to the filing of a complaint by the Commission. (P. 563.) In *Federal Trade Commission* v. *Eastman Kodak Company,* 274 U.S. 619, 625, the same distinction was made with respect to an order entered under Section 5 of the Federal Trade Commission Act.

It seems reasonable to conclude from these decisions that where, after the institution of a proceeding by the Commission under Section 7, stocks illegally acquired are employed to obtain assets, the Commission has the power to make its proceeding

effective by ordering not only a divestiture of the stock but also of the assets. It follows that in this case, where, after the Commission filed its complaint, the illegally acquired stocks were used for effectuating a merger of the assets of the competing corporations, the Commission had authority to direct a retransfer of the assets. Unless this be true, the anomalous situation would result that the effect of a proceeding by the Commission under Section 7 of the Clayton Act would be to induce a merger of the assets of the competing corporations, rather than to restore competition.

CONCLUSION

It is respectfully submitted that the decision below was correct, and that there is no conflict of decisions. The petition should be denied.

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APPENDIX

The pertinent provisions of Sections 7 and 11 of the Clayton Act, c. 323, 38 Stat. 730, 731–732, 734–735 (U.S.C., Title 15, Secs. 18, 21), are as follows:

SEC. 7.

* * * * *

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

* * * * *

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason

to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * *

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of ap-

peals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have

the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

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